



November 19, 2004

Jennifer J. Johnson
Secretary of the Board
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

RE: Docket No. R-1210

Dear Ms. Johnson:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions, I am responding to the Federal Reserve Board's (Board) request for comment on the proposed rule to amend 12 C.F.R. Part 205, "Regulation E", which implements the Electronic Fund Transfer Act (EFTA).

The proposed revisions to the regulation address the coverage of electronic check conversion services and service providers. Under the proposed rule, persons that make electronic check conversion services available to consumers would have to obtain a consumer's authorization for the electronic funds transfer (EFT). The proposed rule also extends the coverage of Regulation E to include payroll card accounts that are established directly or indirectly by an employer on behalf of a consumer for the purpose of providing salary, wages, or other compensation on a recurring basis. Revisions to the staff commentary include guidance on preauthorized transfers, additional electronic check conversion issues, and error resolution.

NAFCU supports the Board's efforts to amend Regulation E to protect consumer interests. However, NAFCU believes that a better balance can be achieved between providing adequate consumer protections and reducing the regulatory burden. In particular, NAFCU feels that some of the new disclosures being proposed by the Board may actually result in over-notification and consumer confusion. NAFCU offers specific comments on the proposed changes as discussed below.

Electronic Check Conversion

The EFTA provides that transactions originated by check, draft or other paper instrument are not governed by the Act. In 2001, the Board added staff commentary that provides that an

electronic conversion transaction is covered by EFTA and Regulation E if the consumer authorizes the transaction as an EFT.

NAFCU supports the proposed change to Regulation E that incorporates the 2001 staff commentary into the regulation itself and requires payees, including merchants, to obtain a customer's authorization for the electronic transfer. NAFCU also agrees that the required notice to process the transaction as an electronic check conversion (ECK) should indicate that funds may be debited from a consumer's account quickly. NAFCU however does not believe that a merchant need disclose that a consumer may not get his/her check returned. Some financial institutions, and most credit unions, do not return checks to their customers / members, and as a result NAFCU believes this provision could create confusion. Also, NAFCU believes that eliminating the provision will create a more concise notice and ensure that consumers actually read the provisions.

The proposed staff commentary also explains that a payee may use the consumer's check as a source document for an ECK transaction or to process a check transaction if the payee provides notice to obtain the consumer's authorization. NAFCU agrees that the notice can either be a generic statement or sign at the POS, or may be provided with a billing statement. Providing an option will not only create flexibility, but will also give consumers more opportunities to be notified. In addition, NAFCU believes that all three clauses in the model notice are not necessary as the clauses contain duplicative information.

The commentary further clarifies that an EFT from a consumer account to pay a fee on an EFT or check returned for insufficient funds is covered by Regulation E and that the electronic representment of a returned check is not covered by Regulation E. NAFCU believes that for clarity, Section 205.3(c)(1) should distinguish between a check that was represented electronically and an EFT originated by a check that was represented for payment.

Payroll Cards

NAFCU agrees that including payroll cards in the definition of Regulation E may be sound in theory because of the characteristics of a payroll account, but in practice, many of NAFCU's members may cease to offer this product because of the additional number of man-hours that will be required to produce additional disclosures. Further, while payroll accounts do provide employees, through their employers, a less expensive means than using check cashing services to access funds, payroll accounts should not take the place of traditional interest-bearing savings accounts. NAFCU believes that including payroll accounts within the protections of Regulation E may actually serve to undermine financial literacy efforts by dissuading individuals from establishing a sound relationship with a financial institution, including a credit union. Also, including payroll accounts in Regulation E creates a question as to the applicability of "Truth in Savings" rules, "Regulation D" reserve requirements, and various state laws to those accounts. Therefore, NAFCU believes that payroll cards should not be covered by Regulation E.

Issuance of Access Devices

Generally, under the “one-for-one” rule, a creditor may not issue more than one credit card as a renewal of, or substitute for, an accepted card. NAFCU supports the revision to the proposed rules that clarifies that a financial institution may issue more than one supplemental access device in conjunction with the issuance of a renewal or substitute device. However, for certain credit unions, requiring verbal activation for a second access device, as is required by § 205.5 (b) for unsolicited access devices, will preclude members from activating a device during non-business hours. Currently, members activate the initial substitute device via an automated phone system. It is unclear whether using an automated system constitutes written authorization under the federal E-Sign Act. NAFCU supports a FCU’s ability to issue more than one credit card as a renewal of, or substitute for, an accepted card that can be activated with an automated phone system, as long as adequate fraud protections are in place.

Error Resolution

Under the current provisions of Regulation E, a financial institution may satisfy its obligation to investigate an alleged error by reviewing its own records if the alleged error occurred to or from a third party and there is no agreement between the institution and the third party for the type of EFT involved. A proposed revision to the staff commentary to §205.11 clarifies that an institution’s own records should not be confined to payment instructions, but should include anything within “the four walls” of the institution. With more and more services being provided by third-party vendors, NAFCU believes that further clarification is needed as to the implementation of the four-walls rule.

Initial Disclosures

The proposed revision to Comment 7(a)-1 provides that an institution may choose to provide early disclosures about ECK just as the institution can provide other disclosures earlier than the regulation requires. NAFCU supports providing early disclosures for all Regulation E notices. Early notification permits an institution to establish a single means of notifying members, and NAFCU believes this method is the most cost effective means of complying with the provisions of Regulation E. While NAFCU recognizes that providing additional notices, such as when the terms of a member’s account changes, are necessary, NAFCU believes providing as many initial disclosures as possible to the member both educates the member and assists the credit union in its regulatory burden. For instance, specifically listing ECK transactions as a type of electronic fund transfer in an initial disclosure gives sufficient notice to consumers that an ECK transaction is covered by error resolution procedures.

Preauthorized Transfers

Under the E-Sign Act, electronic signatures and records satisfy any legal requirements as would a traditional written signature and record. The current staff commentary to 10(b)(3) specifies that a tape recording of a customer agreeing to recurring transfers does not satisfy the written requirement of Regulation E. The proposed staff commentary deletes this reference and

states only that preauthorized EFTs must be in writing and that this requirement cannot be satisfied by a payee signing a written authorization based on a consumers' oral authorization. NAFCU supports the position that a tape recording of a customer agreeing to a recurring transfer does satisfy the federal E-Sign Act and supports financial institutions' ability to interpret the law as such if institutions have adequate protections in place to prevent fraud.

Generally, a financial institution must give a consumer notice when a preauthorized transfer is of a different amount than the last transfer. Comment 10(d)(2) permits the payee or financial institution to give a consumer the option of receiving notice of a transfer only if it is of a different amount than the last transfer when a transfer falls out of a particular range or agreed upon amount. New proposed comment 10(d)(2)-2 provides that if the institution has offered a consumer a specified range of debits and is transferring funds to an account of the same customer at another financial institution, the institution does not need permission from the consumer to provide notice of the range in lieu of individual notice for each transaction. NAFCU supports this new comment.

Disclosures at Automated Teller Machines

The Board proposes to revise the staff commentary of § 206.16 to give financial institutions more guidance regarding required notices at ATMs. The proposed commentary would provide that if there are circumstances in which an institution does not charge a fee for an ATM transaction, the required notice on an ATM advising the consumer of charges can state that the financial institution *may* charge a fee, instead of that it *will* charge a fee. NAFCU supports giving institutions this flexibility.

Timing

Finally, NAFCU requests that the Board give financial institutions 12 months from the effective date of the final rule to implement the new disclosures. NAFCU believes six months is insufficient time to ensure complete compliance.

NAFCU would like to thank you for this opportunity to share its views on this proposed rule. Should you have any questions or require additional information please call me or Carrie Hunt, NAFCU's Associate Director of Regulatory Affairs, at (703) 522-4770 or (800) 336-4644 ext. 234.

Sincerely,



Fred R. Becker, Jr.
President/CEO

FRB/crh